APPENDIX A

— Ariz. —
442 P.2d 97

Edna (Van-Y) MARKEL, Appellant,
v.
PHOENIX TITLE & TRUST COMPANY, Trustee, and Virginia R. Van-Y and the Estate of Earl Van-Y, Deceased, O. W. Helsel, and Helsel and Helsel, Appellees.

No. 9210-PR.

Supreme Court of Arizona.
In Banc.
June 5, 1968.

Alen Philip Bayham, Raymond Huffsteter, Phoenix, for appellant.

Divelbiss & Gage, by G. David Gage, Phoenix, for appellees.

McFARLAND, Chief Justice.

This case is before us an a petition for review of the decision of the Court of Appeals, 6 Ariz.App. 585, 435 P.2d 714, affirming the judgment of the trial court. Decision of the Court of Appeals vacated.

In December 1939 plaintiff Edna Markel obtained a divorce from Earl E. Van-Y, hereinafter called Earl, in Sedgwick County, Kansas, where they were both living. The divorce decree approved a written property settlement in lieu of alimony, by which Earl agreed to give plaintiff "one-half interest in any funds that may be obtained through" the sale of a parcel of real estate located in Arizona. Subsequently Earl married defendant Virginia Van-Y, hereinafter referred to as Virginia. The Arizona property passed, through several parties, to Virginia.

In 1957 she sold the property for $25,000, describing it as her sole and separate property. Transamerica Title and Trust

Company (then called Phoenix Title and Trust Co.) was made escrowee and trustee. The transfer of the property to Transamerica, as trustee, was to expedite the deeding of part of the property each time a payment was made — an arrangement commonly known as a subdivision trust. Knowledge of this sale came to the notice of plaintiff, and, on April 30, 1959, she brought an action against Virginia and Transamerica, asking the court to hold that Transamerica hold the reversionary interest in the realty in trust for plaintiff; that Transamerica should hold $13,037.50 and interest for plaintiff's use and benefit, and in due course should distribute same to plaintiff; that Virginia be ordered to pay plaintiff $11,865 wrongfully paid to her by Transamerica; and that each defendant be restrained from making any disposition of Virginia's reversionary interest in the property or the proceeds of the trust, pendente lite.

Transamerica, though served, failed to appear, and a temporary injunction was granted by the court on May 18, 1959, ordering Transamerica not to pay out any money from the trust until further order of the court. Plaintiff posted a five-hundred-dollar bond.

On June 18, 1959, the court issued a permanent injunction which enjoined Transamerica from making any disposition of Virginia's reversionary interest, or her interest in the proceeds, until it paid her the sum of $13,037.50 and interest. The $500 bond was exonerated.

On January 22, 1960, the default judgment against Transamerica was set aside and the injunction necessarily fell with the judgment. Transamerica then made two payments to Virginia —$4,402 on February 17, 1960, and $4,214.57 on December 30, 1960.

Before any more payments were made, a hearing on the merits of the case took place, resulting in a judgment for defendants at the close of plaintiff's case. An appeal was taken, and, on February 2, 1966, we reversed and remanded the case for trial, holding that plaintiff had made out a prima facie case for

the imposition of a constructive trust, in the trial court. Markel v. Phoenix Title & Trust Co., 100 Ariz. 53, 410 P.2d 662.

In 1962, 1963, and 1964, while the appeal was pending, Transamerica received payments due, from the sale of the real estate, totalling over $8,000 including interest. On April 7, 1966, after our decision, plaintiff filed a second amended complaint, setting forth the facts alleged in the original complaint which we held in Markel v. Phoenix Title, supra, had been sufficiently proven to constitute a prima facie case for the imposition of a constructive trust. The amended complaint set out a copy of Edna's written property agreement with Earl, and alleged that it had been approved by her divorce decree; that Virginia had entered into an escrow and a secret trust agreement with Transamerica bearing number 2197; that thereafter Transamerica "received and wrongfully made disbursements to Virginia Van-Y in the aforesaid trust after this action was commenced, for the sum of $13,037.50"; that defendants "have fraudulently caused said funds to be transmitted to Virginia Van-Y * * * to deprive plaintiff of her rights to one-half the proceeds * * * and that defendants' aforesaid wrongful transfer was in breach of defendants' obligations, after being fully placed on notice of plaintiff's rights and was in direct breach of its duty to plaintiff. * * *" The prayer was for money damages only, in the sum of $13,037.50 and interest, and "for such other and further relief as to the court may seem meet and proper."

The issues as stated in the first complaint were clear and would have permitted recovery. The second complaint, after setting forth the facts alleged in the first complaint in regard to the written property settlement in the divorce decree, the sale and the payments thereunder to Transamerica as trustee, further alleged the subsequent wrongful disbursements. As it is, the second amended complaint may be described by the words used in Barnes v. Eastern and Western Lumber Company, 205 Or. 553, 287 P.2d 929, in which the Supreme Court of Oregon said:

> "* * * The facts stated in the complaint would have permitted recovery, as we have indicated, on several theories. Among the possible theories were deceit, conversion * * *,

money had and received, the recovery of specific property by constructive relief, or any other theory within the scope of restitution."

The allegations of the second complaint in the instant case are sufficient to permit plaintiff to prove her original contention that defendants were, and still are, constructive trustees of the proceeds of the sale of the property. The new material is also sufficient to permit plaintiff to prove the elements of a conversion of those proceeds, as she alleges a wrongful transfer of the money by Transamerica after knowledge by it of plaintiff's claim of the right to possession of the funds.

If defendants had any doubts of what was meant by the allegations of the second amended complaint, they could have moved for a more specific statement. Long v. Arizona Portland Cement Company, 89 Ariz 366, 362 P.2d 741; Davidson v. All State Materials Company, 101 Ariz. 375, 419 P.2d 732. Rule of Civil Procedure No. 8 (16 A.R.S.) states that the complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief" and "[a] demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded." See Lun v. Mahaffey, 94 Or. 292, 185 P. 746.

Transamerica filed a new answer, admitting—with the following exceptions—all of the allegations of the complaint: (1) It denied (on information and belief) that the property settlement agreement existed; (2) It denied that the trust agreement between it and Virginia was secret, (3) It denied that the $13,037.50 received by it and disbursed to Virginia was disbursed wrongfully; and (4) It denied (on information and belief) that it fraudulently transmitted funds from the trust to Virginia, and alleged that it had no information of any fraud or wrongdoing. The answer also alleged that it was not under any injunction when it disbursed the funds.

Denial (1) may be ignored, since Virginia, in answer to interrogatories, admitted the existence of, and her knowledge of the contents of, the property agreement. Denial (2) is com-

pletely immaterial. Denial (3) is clearly a legal issue, rather than a fact question; it must be resolved by the application of legal principles, not by the introduction of evidence. Denial (4) must be construed to mean that Transamerica had no knowledge of any fraud or wrongdoing on the part of Virginia at the time it accepted the trust, since there can be no doubt that it had knowledge of her wrongdoing after the case was tried the first time. It was a party to the first appeal, and was represented by counsel throughout that appeal.

It is therefore clear that the real issues in this case are: 1. Was Transamerica's action in disbursing funds to Virginia, after knowledge that plaintiff claimed them to be encumbered with a constructive trust in her favor, wrongful or fraudulent? and 2. Was Transamerica excused from the consequences of its disbursements because of the trial court's judgment and plaintiff's failure to try to get a stay order? These issues present questions of law, not fact; hence, they may be resolved on a motion for summary judgment.

Such a motion was filed by Transamerica, on the ground that there was no material issue of fact. In support thereof, it attached an affidavit setting out the dates and amounts it had paid Virginia from money received under the trust. The affidavit contained nothing else! In reply to the motion, plaintiff filed only a memorandum of authorities and did not controvert the affidavit. Transamerica also filed memorandum of authorities.

On October 14, 1966, the trial court applied Rule 56(e), Rules of Civil Procedure (16 A.R.S.), and granted summary judgment to Transamerica, stating as its reasons (1) that plaintiff failed to respond with specific facts and affidavits, and (2) that there was no genuine issue of fact raised by the pleadings.

The first reason represents an incorrect application of Rule 56(e). That rule states that if plaintiff does not respond with specific facts, summary judgment "if appropriate" shall be entered against her. This is but another way of saying what is said in Rule 56(c)—namely, that judgment shall be entered if it appears that there is no genuine issue of fact *and* that "the moving party

is entitled to a judgment as a matter of law." The rule contemplates that where the moving party is specific, the documents controverting his pleading must be specific. But, as we said in Carpenter v. Superior Court etc., 101 Ariz. 565, 422 P.2d 129; in quoting from a previous case, Lujan v. MacMurtrie, 94 Ariz. 273, 383 P.2d 187:

> "* * * if the papers of the moving party fail to show that he is entitled to judgment as a matter of law, the opposing party need not file an opposing affidavit. * * *"

But one cannot deny or controvert a true statement, and certainly ought not even to try to do so. Transamerica's motion is supported by an affidavit containing only true statements, viz: the dates and amounts of money distributed to Virginia. Rather than tending to prove that Transamerica is entitled to judgment, the affidavit shows that *plaintiff's* allegations are true. To enter judgment against plaintiff for failure to deny what both parties allege to be true is not a proper interpretation of Rule 56(e). If A sues B, alleging an assault and battery, and B defends by a motion for summary judgment, to which is attached an affidavit that B did in fact on a certain date commit the assult and battery, no one would argue that B was entitled to judgment because of A's failure to deny the affidavit stating the fact to be as A has alleged in his complaint!

The second reason given by the trial court for entering a summary judgment was that there was no genuine issue of material fact. We agree with the truth of this statement, and with the corollary that summary judgment must therefore be granted—but, in this case, to plaintiff rather than to defendant.

It has been determined in other jurisdictions that a judgment on a motion for summary judgment may be either for or against the moving party, even though the opposing party has not filed such a motion. American Auto Insurance Co. v. Indemnity Insurance Co. of North America, 108 F.Supp. 221 (Aff: 3 Cir., 228 F.2d 622). We have tacitly recognized this principle, by following it without comment in Carpenter v. Superior Court, supra.

Since, therefore, the pleadings in this case indicate that there

is no material dispute over the facts, and that the issues are all legal rather than factual, judgment must be for plaintiff at this stage of the proceedings, if the legal issues are resolved in her favor.

As previously indicated, the first of the two legal issues to be decided is whether it was wrongful or fraudulent for Transamerica to disburse the money to Virginia with full knowledge that plaintiff claimed it to be subject to a constructive trust. We can, at the outset, disregard any claims of *fraud* on the part of Transamerica. The worst that we can say about it is that it permitted Virginia's lawyer also to handle its interests, in a situation where they were not identical with hers, and, as a result, all of Transamerica's moves were directed toward helping her instead of toward helping Transamerica by merely remaining neutral.

We therefore limit this discussion to the question of whether the disbursements to Virginia were *wrongful*. In the context of the instant case, "wrongful" refers to an act by Transamerica which is a breach of its duty to plaintiff. In the former appeal of this case (100 Ariz. 53, 410 P.2d 662), we held that plaintiff had proved a prima facie case for imposing a constructive trust, based on fraud by Virginia, as to one-half of the proceeds of the sale of the property. We carefully refrained from mentioning Transamerica because there was no evidence of any fraud on its part. But, if the proceeds are encumbered by a constructive trust, the person holding them, with knowledge of the facts, must of necessity be a constructive trustee. As we said in the prior appeal, supra:

> "'* * * where actual fraud does not exist in the *acquisition* of property, a constructive trust will arise whenever the circumstances make it inequitable that the property should be *retained* by the one who holds the legal title. * * *' Linder v. Lewis, Roca, Scoville and Beauchamp, 85 Ariz. 118, * * * 333 P.2d 286 * * *
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> "'* * * A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.' Cardozo, C. J., in Beatty v. Guggenheim Exploration Co., 225 N.Y. 380 * * * 122 N.E. 378, * * *" [Italics added.]

One from whom money has been obtained by fraud does not lose title thereto as against a wrongdoer, merely because the latter transfers the money to a third party. In Re Accles', 153 Misc. 421, 275 N.Y.S. 430, where money was fraudulently obtained from plaintiff and deposited in a bank, after which the wrongdoer died and the deposit was claimed by his executrix, the court held:

> "The money, when deposited by the decedent in the Fleetwood Bank, was still the money of the Philippine Bank [plaintiff]. * * * The Fleetwood Bank was a mere depository. * * *
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> "* * * the law makes the Fleetwood Bank constructive trustee of so much of the money as remained a balance in the decedent's account. * * *"

In Eckert v. Miller, 57 Ariz. 94, 111 P.2d 60, we approved the following language from Pomeroy, in his work on Equity Jurisprudence, 3d Ed., Volume 3, Section 1053, as follows:

> "'In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, * * * or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. * * *'"

This view is also supported by IV Scott on Trusts 2nd Edition, Section 462.4. In the same section, Scott states that when a constructive trust is imposed, it *arises immediately upon the acquisition of the property subject to the trust.* The author concludes by saying:

> "It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court."

We hold, therefore, that in the instant case Transamerica was a constructive trustee from the time that it was served with notice of this action; that, though innocent of any fraud, its duty as constructive trustee was to hold all money that came into its hands under trust No. 2197 until the final disposition of this case; and that the turning over of the money to Virginia was a breach of its duty to plaintiff, and was therefore wrongful.

To interpret our decision in the first appeal as meaning that Virginia was a constructive trustee but Transamerica was not, is completely untenable. This is evident when one considers the situation that would have existed if Transamerica had retained the money until the conclusion of the first appeal. In such case we would have a situation where plaintiff had successfully established a constructive trust on money in the hands of a company which was not a trustee, and, therefore, might transfer the money to Virginia, or any one else, at any time. Even Transamerica could hardly contend that it could rid itself of the money, without penalty, *after* the decision on the first appeal.

The same result may be reached by analysis of cases on the subject of conversion. They hold that plaintiff need show only right to possession, not title (Triggs v. Zicovich, 117 Cal.App.2d 768, 257 P.2d 60); that money may be converted (Seekamp v. Small, 39 Wash.2d 578, 237 P.2d 489); that the property need not have come into defendant's possession unlawfully in order for defendant's acts to constitute a conversion (Byer v. Canadian Bank of Commerce, 8 Cal.2d 297, 65 P.2d 67, and Stockmen's State Bank v. Merchants' and Stockgrowers' Bank, 22 Ariz. 354, 197 P. 888); that in a case of conversion, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action (Byer v. Canadian Bank of Commerce, supra); that an executor may be guilty of conversion even though the property came to him as a part of decedent's estate (Stockmen's State Bank v. Merchants' and Stockgrowers' Bank, supra); that a bailee with notice of the claim of the true owner may not deliver it to the bailor, whereby it is lost to the owner, without rendering himself liable to the owner as for a

conversion (Investment Service Co. v. O'Brien, 190 Or. 394, 223 P.2d 163, 170).

It is, of course, true that a trustee (as in the instant case) has both title and possession, while a bailee has possession but not title. Since, however, the wrong of conversion is an interference with plaintiff's possession, it would seem that a trustee is in the same position as a bailee—that is, the effect of the act would be a conversion (interference with the other party's right to possession) regardless of whether the actor is a bailee or a trustee. It has been so held in White v. Sherman, 168 Ill. 589, 48 N.E. 128, 131:

> "* * * the weight of authority [is] that, where he invests trust money in his individual name, he commits a breach of trust which subjects him to the same liability as if there had been a willful conversion to his own use. * * *"

Also, in Pacific Indemnity Co. v. Grand Avenue State Bank of Dallas, Texas, 223 F.2d 513 (513 Cir. 1955):

> "* * * the check, when received and deposited, was impressed with a constructive trust in favor of appellant. * * * As between Sharrock [the depositor] and appellant, this [constructive] trust or equitable claim was enforceable against the proceeds of the check even though it had been deposited. While it is true that the Bank had no knowledge * * * when the check was deposited * * * the Bank's knowledge was sufficient to put it upon inquiry * * * inquiry would have revealed the existence of the equitable trust with which the proceeds of the check were impressed. Notwithstanding this knowledge * * * the Bank paid itself out of funds of which it knew or should have known that Sharrock was not the equitable owner."

We hold, therefore, that the disbursement of the proceeds of the sale of the property by Transamerica to Virginia, even though made in the utmost good faith, and pursuant to a written agreement, was—after it had knowledge of plaintiff's claim of a constructive trust—both a breach of its duty as trustee, and a conversion of such funds.

The second issue to be considered is whether Transamerica's disbursement of the money to Virginia was excused or justified

by the erroneous judgment for defendant, coupled with plaintiff's failure to try to obtain a stay order. Transamerica argues that the decree was valid until reversed; that all acts done pursuant to the judgment are protected by it from later becoming tortious; that upon a reversal of a judgment a defendant need return only the benefits which it still has in its possession, and since Transamerica paid out all of the money to Virginia, it need return nothing; that plaintiff, by failing to try to effect a stay, is responsible for the disbursement and cannot now be heard to complain. Transamerica extensively argues these propositions and cites cases supporting them.

Transamerica quotes 5 Am.Jur.2d 424 to the effect that a judgment is "sufficient justification for all acts done *in its enforcement* before it is reversed." [Italics ours.] Transamerica calls that statement the "universal rule," and states that virtually all decisions to that effect flow from Bridges v. McAlister, 106 Ky. 791, 51 S.W. 603 (1899), and Porter v. Small, 62 Or. 574, 120 P. 393 (1912).

In Bridges, supra, a decree directed appellant to fill up a ditch. This was done, causing flooding of appellee's land. When the decree was reversed, appellee sued for damages. The court held that, since the judgment was valid until reversed, appellant *had* to obey the order to fill the ditch, and therefore could not later be held *in tort* for damages. The court said that the judgment, though later reversed, was sufficient justification for "all acts done by plaintiff *in enforcing it.*" [Italics ours.]

In Porter, supra, the decree awarded defendant Small certain rights to irrigation water, which he then took each year during the pendency of the appeal, which later reversed the decree. The suit was for damages for the taking of the water before the reversal of the decree. These cases have no bearing on the instant case. The Bridges case, supra, involves rights in regard to flood water. The Porter case, supra, involves the rights in regard to irrigation water. They are in tort for damages, and involve altogether different questions than those in the instant case.

In the original Markel case, supra, we held that there was prima facie evidence of a constructive trust. A constructive trust dates back to the date that the money was received. It was not necessary for plaintiff to secure a restraining order against Transamerica, as it was made a party to the suit and had full notice of the contract and of the pleadings in which it was alleged that there was a constructive trust on the funds paid under the sale. Under these circumstances if Transamerica wrongfully transferred these funds after this notice, well knowing the case was on appeal, it would be liable for payment of the trust funds.

If a plaintiff were afraid a trustee would not be financially able to pay the amount of the funds in the event the court held a constructive trust existed, he could—if he were financially able—protect himself by asking for a restraining order, but if he knew it was solvent and a judgment would be good against it, this would not be necessary.

The inapplicability of the cases to the facts of the instant case is due to the fact that the usual situation is one where plaintiff prevails in the lower court, and comes into possession of defendant's property by the use of process—such as an execution—directly arising from the judgment. In such cases, restitution is a proper remedy, since such a plaintiff still has the property wrongfully taken, or has sold it and has the proceeds of the sale. In either event, retention would constitute unjust enrichment. In the instant case, however, Transamerica did not take the property or money directly from the possession of plaintiff. The money was received by Transamerica from the buyer of the property, and was turned over to Virginia without any consideration. This makes the doctrine of restitution inapplicable, because of the lack of any unjust enrichment by Transamerica.

In any event, we do not accept the contention of Transamerica that plaintiff's relief, after judgment in favor of defendants has been reversed, should be limited to money still in the hands of a defendant who has intentionally parted with the money with full knowledge of the pending appeal. Such a doctrine would leave a

plaintiff helpless. Upon announcement of the reversal—if we accept this argument—Virginia could have asked Transamerica to send the money to her sister in another state. Transamerica could then disclaim all liability.

The general rule is that a reversal of a judgment restores the parties to the same position as if the action had never been tried. People v. Lagiss, 223 Cal. 2d 23, 35 Cal.Rptr. 554, 567. As early as 1852, the Supreme Court of Alabama held that the fact that an administrator had collected money by execution issued on a judgment that was later reversed, and had paid out the money to the heirs, was no bar to an action to recover the money from him. Williams v. Simmons, 22 Ala. 425.

However, the general theory of the early cases was that there could be no successful claim *sounding in tort* for an act required by a judgment of a court of competent jurisdiction. This is as it should be. No one ought to be placed in a position where he must risk a suit for damages if he obeys, or contempt of court if he fails to obey, a lawful order of a court. However, this principle does not apply here. The instant law suit does not sound in tort. It is, rather, like the case of Tucker v. Brown, 20 Wash.2d 740, 150 P.2d 604, wherein the Supreme Court of Washington quoted with favor from the trial judge when he stated:

> "'* * * There is no question, in my opinion, of any tort at all. The substantiation of a trust is purely one of contract; * * * and whatever means or whatever allegations somebody employs to impress trust property and to recover trust property still has its basis in contract, * * *'"

It should be noted that the disbursement to Virginia was not done by command of the court. Transamerica was in no dilemma by which paying would result in a claim by plaintiff, and failure to pay would result in its being in contempt of court. *The court did not order it to pay Virginia.* Transamerica, first, could have paid the money into court under interpleader proceedings. Second, it could have held the money, explaining to Virginia that the matter was still subject to reversal on appeal. And, third, it could

tell Virginia that it would not pay her the money pending the appeal unless she gave proper indemnification.

Transamerica next contends that plaintiff should have protected herself by a supersedeas bond or a stay order. Assuming for the sake of argument that she could have done this, why should she have done so? She knew that Transamerica was financially responsible. She had no fear that if the money were wrongfully paid out, Transamerica would be unable to pay her.

In addition to the fact that general legal principles require the conclusion that the reversed judgment of the superior court did not excuse or protect Transamerica; there is direct authority on the subject. In Mann v. Thompson, 118 So.2d 112 (Fla.App. 1960), the court said:

> "* * * if an appellant determines to appeal without posting a supersedeas bond, it is his privilege to do so. An appellant's election not to take the steps necessary to supersede or stay the judgment or decree pending appeal does not as a matter of law bar his entitlement to restitution upon reversal by the appellate court."

In Lytle v. Payette-Oregon Slope Irr. Dist., 175 Or. 276, 152 P.2d 934, the Oregon Supreme Court had before it a case where the defendant argued that the plaintiff might have saved himself from the loss of the use of his property by giving a supersedeas bond. The court said:

> "* * * To refuse him such compensation, merely because he was unwilling or unable to give a stay bond, would be manifestly unjust, and, we think, would be a denial of complete restitution. * * *"

In Lytle, supra, the Oregon Supreme Court also referred to language from an older Oregon case:

> "* * * Thus, in Siverson v. Clanton, 88 Or. 261, 170 P. 933, 171 P. 1051, 1052, the complaint was construed to state a cause of action for the recovery of money paid under compulsion or duress of personal property, notwithstanding that it alleged that the defendants 'took, converted, and appropriated said' personal property 'to their own use', and thus might have been construed as in trover. * * *"

In Ure v. Ure, 223 Ill. 454, 79 N.E. 153, 156, the court's opinion states:

> "* * * A party to a suit is presumed to know of all the errors in the record, and such party cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal thereof. If such party has received benefits from the erroneous decree or judgment, he must, after reversal, make restitution, and, if he has sold property erroneously adjudged to belong to him, he must account to the true owner for the value. * * *"

The judgments of the Court of Appeals and of the Superior Court are vacated. The dates and amounts of Transamerica's disbursements to Virginia were as follows:

February 17, 1960	$ 4,402.00
December 30, 1960	4,214.57
January 17, 1962	3,994.93
April 10, 1963	426.00
	$13,037.50

The case is remanded to the Superior Court with directions to enter judgment for plaintiff for $13,037.50 with interest on each of the above disbursements from its date.

UDALL, V. C. J., STRUCKMEYER, BERNSTEIN, and LOCKWOOD, JJ., concur.

APPENDIX B

SUPREME COURT, STATE OF ARIZONA
PHOENIX

July 10, 1968

EDNA (VAN-Y) MARKEL, Appellant, v. PHOENIX TITLE & TRUST COMPANY, now known as Transamerica Title Ins. Co., Trustee; and VIRGINIA R. VAN-Y and THE ESTATE OF EARL VAN-Y, deceased; O. W. HELSEL, and HELSEL AND HELSEL, Appellees.	No. 9210-PR

The following action was taken by the Supreme Court of the State of Arizona on July 9, 1968, in regard to the above-entitled cause:

"ORDERED: Appellees' motion for rehearing = DENIED."

SYLVIA HAWKINSON,
Clerk
By Lucile Brooks,
Assistant Clerk

APPENDIX B-1

SUPREME COURT, STATE OF ARIZONA
PHOENIX

September 18, 1968

EDNA (VAN-Y) MARKEL, Appellant, v. PHOENIX TITLE & TRUST COMPANY, now known as Transamerica Title Ins. Co., Trustee; and VIRGINIA R. VAN-Y and THE ESTATE OF EARL VAN-Y, deceased; O. W. HELSEL, and HELSEL AND HELSEL, Appellees.	No. 9210-PR

The following action was taken by the Supreme Court of the State of Arizona on Tuesday, September 17, 1968, in regard to the above-entitled cause:

"ORDER: Appellee's motion for amendment of mandate — DENIED."

SYLVIA HAWKINSON,
Clerk
By Lucile Brooks,
Assistant Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ARIZONA

EDNA (VAN-Y) MARKEL, Appellant, vs. PHOENIX TITLE & TRUST COMPANY, TRUSTEE, etc., et al, Appellees.	NO. 9210-PR MANDATE

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa.

GREETING:

WHEREAS, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between EDNA (VAN-Y) MARKEL, Plaintiff, v. PHOENIX TITLE & TRUST COMPANY, Trustee, and VIRGINIA R. VAN-Y and the Estate of EARL VAN-Y, Deceased, O. W. HELSEL, and HELSEL AND HELSEL, Defendants, Cause No. 107182, said Superior Court entered its judgment on October 14, 1966, in favor of The Transamerica Title Insurance Company, and against Edna (Van-y) Markel, as by the inspection of the record of the said Superior Court, which was brought into the Court of Appeals, Division One, of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

AND WHEREAS, in November, in the year of our Lord one thousand nine hundred and sixty-seven, the said cause came on to be heard before the said Court of Appeals, Division One, and was submitted for decision after argument of counsel.

ON CONSIDERATION WHEREOF, it was on the fifth day of January in the year fo our Lord one thousand nine hundred and sixty-eight, ordered by said Court that the judgment of the

said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on January 30, 1968, appellant filed a Petition for Review by the Supreme Court, on consideration of which the said Supreme Court on February 27, 1968, ordered that the Petition for Review be granted. On Consideration Whereof, it was on the 5th day of June, 1968, ordered that the judgments of the Court of Appeals and of the Superior Court are vacated. The dates and amounts of Transamerica's disbursements to Virginia were as follows:

February 17, 1960	$ 4,402.00
December 30, 1960	4,214.57
January 17, 1962	3,994.93
April 10, 1963	426.00
	$13,037.50

The case is remanded to the Superior Court with directions to enter judgment for plaintiff for $13,037.50 with interest on each of the above disbursements from its date.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

WITNESS, the Honorable Ernest W. McFarland, Chief Justice of the Supreme Court of the State of Arizona, the fifteenth day of July, in the year of our Lord one thousand nine hundred and sixty-eight.

/s/ Sylvia Hawkinson,
Clerk of the Supreme Court
of the State of Arizona

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ARIZONA

EDNA (VAN-Y) MARKEL, Appellant, vs. PHOENIX TITLE & TRUST COMPANY, now known as Transamerica Title Insurance Company, Trustee, and VIRGINIA R. VAN-Y and The Estate of EARL VAN-Y, Deceased, O. W. HELSEL, and HELSEL AND HELSEL, Appellees.	NO. 9210-PR MOTION FOR REHEARING OF APPELLEE TRANSAMERICA TITLE INSURANCE CO.

Comes now appellee Transamerica Title Insurance Company, and respectfully moves the Court for a rehearing, reconsideration, and/or modification of its Opinion in this cause. Submitted herewith is our Memorandum, indexed as follows:

I. SINCE NO TRIAL OR HEARING HAS YET BEEN HELD ON THE QUESTION OF FOUNDATION LIABILITY AS BETWEEN MRS. MARKEL AND MRS. VAN-Y, THIS CAUSE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION; THE GRANTING OF JUDGMENT WITH INSTRUCTIONS AGAINST TRANSAMERICA ON APPEAL DEPRIVES TRANSAMERICA OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW 1

* * * * * *

Procedural Posture: The first opinion on appeal, *Markel v. Phoenix Title & Trust Co.*, 100 Ariz. 53, 410 P.2d 662 (1966), held that a *prima facie* case of constructive fraud was established, and that since defendant's motion for judgment at the close of plaintiff's case prevented defendant from presenting her

case, the action was remanded for a new trial consistent with the decision.

There was never any trial on the merits after remand. After the pretrial order [A.R. 105], which identifies the limited question now before the Supreme Court as a "special issue of law" [A.R. 106-107], plaintiff Markel filed her second amended complaint [A.R. 89], which alleged [A.R. 92] that she had "rights to one-half the proceeds of the first beneficiary's interest" under the subdivision trust [photocopied beginning at seventh unnumbered page after A.R. 32]. This allegation of *foundation liability* was denied by defendant Van-Y (represented by Lewis, Roca, Beauchamp & Linton) at A.R. 110, and said *foundation liability* was denied by Transamerica (represented by Divelbiss & Gage) at A.R. 99-100.

The motion for summary judgment involved in this appeal [A.R. 112] was then filed before trial date [A.R. 107].

As is usual in cases involving multiple parties, Transamerica's motion for summary judgment was directed to issues which it contended established its non-liability notwithstanding the outcome of the trial to determine whether there was any *primary liability* of defendant Van-Y to plaintiff Markel. This Court has held that although there may be some issues and facts in dispute, a motion for summary judgment may be filed which addresses itself to an issue which may conclude the action as to a party notwithstanding the ultimate outcome of the disputed issues and facts. *Northen v. Elledge*, 72 Ariz. 166, 232 P.2d 111, 114 (1951). The Transamerica motion for summary judgment was then set for hearing, argued, and granted [A.R. 219-222], all before the continued date set for the trial of the case [A.R. 219].

On the date which had been set for trial, preliminary matters were disposed of, and the court then recessed the trial pending a ruling upon the admission of the original transcript of testimony in the previous trial [A.R. 222-225]. During the period of the recess of the trial, Judge Cordova signed the formal written judgment [A.R. 225], after which Judge Hays ruled that the

original transcript would not be admitted as evidence [A.R. 225-226].

Upon stipulation of counsel for plaintiff Markel (Mr. Allen P. Bayham) and the attorneys for defendant Van-Y (Lewis, Roca, Beauchamp & Linton), Judge Hays then ordered that the trial be recessed for three months, subject to further notification of counsel, with the trial to remain in a recessed status "until a decision has been received from the Appellate Courts on the related matters," the "related matters" being the appeal relative to Transamerica. See A.R. 226-227.

ATTACHED HERETO, AND MADE A PART HEREOF BY REFERENCE, IS THE CERTIFICATION OF THE CLERK OF THE SUPERIOR COURT (Reproduced at end of this Appendix D) TO THE EFFECT THAT *AS OF THIS DATE SAID TRIAL IS STILL IN A RECESSED STATUS, AFTER MANY SUBSEQUENT CONTINUANCES DURING THE PERIOD OF THE PENDENCY OF THIS APPEAL.*

It is to be noted that the judgment in favor of Transamerica is a Rule 54(b) judgment, in that the case involves multiple claims and multiple parties. Judge Cordova expressly determined [A.R. 167] that there was "no just reason for any delay in entering judgment in favor of Transamerica." Compare Rule 54(b), as amended 1961.

Effect of Latest Decision: By rendering judgment against Transamerica on appeal, the Supreme Court is allowing plaintiff Markel to collect every cent she claims—without ever establishing that she is entitled to any proceeds as between herself and Mrs. Van-Y. Should the trial as between Mrs. Markel and Mrs. Van-Y establish that Mrs. Van-Y was actually entitled to the proceeds, Transamerica's payments to Mrs. Van-Y would not have been subject to any claim by Mrs. Markel. We respectfully submit that Transamerica cannot be deprived of its property until this foundation liability is established by Mrs. Markel.

If the latest reversal with instructions is allowed to stand, this Court will have created a situation Mrs. Van-Y could actually be entitled to all the proceeds paid to her—with no opportunity on

the part of Transamerica to establish this point as between Mrs. Van-Y and Mrs. Markel. How, consistent with justice and due process, can the Supreme Court say that Mrs. Markel is entitled to an outright judgment in her favor against Transamerica when there has never been a trial or hearing to determine whether Mrs. Markel is even entitled to one-half of the proceeds involved?

NOTE: At this point in the Motion for Rehearing, our argument and authority relative to the due process question commences. This argument and authority is not reproduced in this Appendix pursuant to Rule 23(3) Supreme Court Rules.

CERTIFICATION

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss.

THIS IS TO CERTIFY that the record in that certain action on file in the Superior Court, Maricopa County, Arizona, entitled Markel v. Transamerica Title, et al, No. 107182, reflects that after a portion of the record was forwarded to the Court of Appeals, four (4) minute orders were entered by Judge Hays, Division 10, each of which continued the date set for trial between plaintiff Markel and defendant Van-Y as follows:

(1) Minute order of January 30, 1967, setting said trial for May 1, 1967; (2) minute order of April 21, 1967, continuing said trial to June 29, 1967; (3) minute order of June 28, 1967, continuing said trial to September 29, 1967; and (4) minute order of October 5, 1967, continuing said trial to April 8, 1968.

THIS IS TO FURTHER CERTIFY that said record shows that said action is still pending and that no trial between plaintiff Markel and defendant Van-Y has been held through and including this date.

WITNESS MY HAND AND THE SEAL OF THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA, on this the 17th day of June, 1968.

WILSON D. PALMER, Clerk
By /s/ Eileen Hicks,
Deputy Clerk and Appeals Clerk

(SEAL)

APPENDIX E

435 P.2d 714
6 Ariz.App. 585

Edna (Van-Y) (Stanley) MARKEL, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY, formerly known as Phoenix Title and Trust Company, Trustee, and Virginia R. Van-Y, Appellees.	No. 1 CA-CIV 538

COURT OF APPEALS OF ARIZONA
Jan. 5, 1968

Rehearing Denied Jan. 25, 1968

Review Granted Feb. 27, 1968

Alan Philip Bayham and Raymond Huffsteter, Phoenix, for appellant.

Divelbiss & Gage, by G. David Gage and Carl W. Divelbiss, Phoenix, for appellees, Transamerica Title Ins. Co.

CAMERON, Chief Judge.

This is an appeal from an order of the Superior Court granting the motion of the defendant, Transamerica Title Insurance Company, previously Phoenix Title and Trust Company, for summary judgment. We are called upon to answer the following questions:

1. Is a judgment of a trial court, which is not stayed pending appeal, valid and enforceable until such time as it is reversed on appeal?
2. Could the appellant have enjoined or prevented the trustee, Transamerica Title, from disbursing funds in the trust pending determination of the matter on appeal?
3. Under the facts in this case was the appellee, Transamerica

Title, a constructive trustee for the benefit of the appellant?

4. Was summary judgment properly granted?

The facts necessary for a determination of this matter on appeal are as follows: The plaintiff-appellant, Edna Markel, was previously married to one Earl Van-Y, and the parties were divorced in December 1939 in Wichita, Kansas. In the property settlement agreement approved by the court in the Kansas divorce the husband agreed to give the plaintiff one-half interest in any funds that he might obtain through resale or disposal of some twenty acres of land in Maricopa County, title to said land being in the name of the husband.

The defendant, Virginia Van-Y, was married to Earl E. Van-Y from February 1941 until the time of his death in Wichita in April of 1959. Before Mr. Van-Y's death, and after conveyances of the property from the husband through others to the defendant, the defendant entered into escrow instructions for the sale of the 20 acres wherein she was described as the "wife of Earl Van-Y dealing with her sole and separate property." A trust agreement was also signed which provided that Virginia R. Van-Y was to be the first beneficiary and Phoenix Title the trustee. The sale of the property was for the amount of $25,000.

On 30 April 1959 plaintiff, Edna Markel, filed a complaint to impose a constructive trust on one-half of the proceeds of the sale of the property. At that time a temporary injunction was entered against Phoenix Title restraining it from paying any monies to Virginia R. Van-Y until such time as Phoenix Title had turned over to plaintiff approximately one-half of the sale price of the property plus interest. The defendant Virginia Van-Y answered and Phoenix Title and Trust Company was defaulted. Judgment was entered in favor of the defendant, Virginia Van-Y, on 11 October 1961 from which order the plaintiff, Edna Markel, appealed to the Supreme Court of the State of Arizona. The contest in the Supreme Court of Arizona was between Edna Markel and Virginia R. Van-Y, with Phoenix Title at most a nominal party. The Supreme Court of the State of Arizona in the matter titled

Markel v. Phoenix Title and Trust Company, 100 Ariz. 53, 410 P.2d 662 (1966), reversed and remanded the cause for new trial stating:

> "We believe the facts in this case brought out at trial create a prima facie case of constructive fraud. (citations omitted)
>
> "A constructive trust expresses the idea that a defendant is under an equitable duty to give the complainant the benefit of property held. A wrongful holding begs relief whether the type of injustice is old or new regardless of whether actual fraud exists."

And:

> "In that defendant never presented her case there must be a new trial consistent with this decision." 100 Ariz. 57, 58, 410 P.2d 665.

Although a temporary injunction had been previously entered restraining Phoenix Title from disbursing the funds under the trust agreement, the judgment of the trial court quashed all restraining orders and injunctions. After notice of appeal by the plaintiff, no supersedeas bond or injunctive relief was requested by the plaintiff pending the appeal. We are concerned in this matter of what liability, if any, Phoenix Title, now Transamerica Title, has incurred because of the disbursal of all the funds out of the trust during the time the matter was on appeal, from 13 November 1961 when the notice of appeal was filed and the opinion of the Supreme Court on 2 February 1966.

Although the first trial was between Edna Markel and Virginia Van-Y with Phoenix Title at most a stakeholder, the trial upon remand was between Edna Markel, trying to impress a constructive trust upon Phoenix Title as constructive trustee, with Virginia Van-Y not participating, she having received all the money due as first beneficiary under the trust. Summary judgment was granted as to the defendant Transamerica Title, and from this judgment the plaintiff again appeals.

WAS THE JUDGMENT OF THE LOWER COURT VALID PENDING APPEAL?

Counsel have cited no Arizona cases exactly in point regarding

the effect of the judgment from which an appeal is taken without supersedeas, although the two cases of Stuart v. Winslow Elementary School District #1, 100 Ariz. 375, 414 P.2d 976 (1966) and School District #1 of Navajo County v. Snowflake Union High School District, 100 Ariz. 389, 414 P.2d 985 (1966), as well as the U. S. District Court case of Zannaras v. Bagdad Copper Corp., 260 F.2d 575 (1958), would indicate that in Arizona persons or parties not restrained or enjoined by supersedeas or by way of other orders of the court may rely upon a judgment of a court until reversed by an appellate court.

The cases from other jurisdictions are in conflict as to whether the pendency of an appeal affects the operation of a judgment as res judicata. See Annotation 9 A.L.R.2d 984 and 2 A.L.R.3rd 1384. We believe from the rationale of Arizona cases (op. cit.) that the rule in Arizona is:

> "A judgment rendered by a court having jurisdiction of the parties and the subject matter protects the parties acting under it before reversal or stay, and constitutes a sufficient justification for all acts done in its enforcement before it is reversed or set aside by competent authority. Acts done under such a judgment cannot be made the basis of an action for damages for tort. However, all proceedings taken under the judgment are dependent for their validity on the judgment being sustained—when it is reversed or set aside, the party to the record who has received the benefit thereof must make restitution to the other party of money or property received under it." 5 Am.Jur.2d, Appeal and Error, § 997, page 424.

Although the defendant, Virginia Van-Y, might be liable to the plaintiff for the money she has received (the benefit of the judgment), we do not believe that the appellee, Transamerica Title, is liable for the disbursements made in reliance upon the judgment granted in favor of Virginia Van-Y in the lower court:

> "The reversal of a judgment does not make void what has been done under it. (citations omitted) A judgment, even though later reversed, protects one who acts under it. What is lawful when done does not become unlawful by reason of subsequent acts any more than acts which were not criminal when com-

mitted can be made criminal by subsequent occurrences. The court in entering a judgment does not act as agent for either party, and a litigant does not procure a judgment in any such sense as to render him responsible for the consequences of the judgment on its reversal by a higher court. A subsisting judgment of a court which had jurisdiction of the parties and the subject-matter constitutes a complete justification for all acts done in its enforcement until it is reversed." Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., 80 F.2d 32, 39, 102, A.L.R. 688 (Court of Appeals 8th, Mo. 1935, cert. denied 297 U.S. 715, 56 S.Ct. 591, 80 L.Ed. 1001). See also Koppel v. Olaf Realty Corp., 62 N.J.Super. 103, 162 A.2d 306 (1960).

We therefore believe in absence of such action by the parties and court which would clearly direct the appellee, Transamerica, to refrain from paying these funds that Transamerica not only could legally disburse them, but, indeed, was under an obligation to do so by virtue of the trust agreement under which it was collecting funds from the purchaser.

COULD AN INJUNCTION OR STAY HAVE BEEN OBTAINED?

Appellant contends that she could have obtained no injunctive relief pending the appeal, and therefore it would be unjust to hold that her failure to seek and obtain injunctive relief pending appeal excused Transamerica Title in disbursing the funds under their trust. With this we do not agree. The rules and statutes of our State are more than adequate to protect an appellant in this type of situation upon proper application. § 12-1801 A.R.S., Rule 62(d), (e), and (h), Rules of Civil Procedure, 16 A.R.S. Rule 62(h) provides:

"The provisions in this Rule do not limit any power of the appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

WAS TRANSAMERICA TITLE A CONSTRUCTIVE TRUSTEE?

It is contended by the appellant that the appellee, Transamerica Title, is liable for wrongly disbursing the proceeds to Mrs. Van-Y because it was a constructive trustee for the benefit of the appellant. The Supreme Court in Markel v. Phoenix Title and Trust Company, supra, 100 Ariz. at page 58, 410 P.2d at page 665, adopted a definition of a constructive trust from Bogart on Trusts, § 471, page 8:

> "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. * * * A court of equity in decreeing a constructed trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."

And in this regard has said:

> "Whether the facts are sufficient to constitute actual fraud is unnecessary to decide. Even where actual fraud does not exist in the acquisition of property, a constructive trust will arise whenever the circumstances make it inequitable that the property should be retained by the one who holds the legal title." Linder v. Lewis, Roca, Scoville & Beauchamp, 85 Ariz. 118, 123, 333 P.2d 286, 290 (1958).

There is nothing in the record to indicate that Transamerica Title acted in such manner that the "conscience of equity" would impose a constructive trust upon it. It knew of the judgment of the Superior Court and had every right to rely upon said judgment until the judgment was reversed or it was enjoined. Nothing in the opinion of our Supreme Court in Markel v. Phoenix Title and Trust Company, supra, indicates that Phoenix Title was a constructive trustee. On the contrary, a careful reading of that opinion indicates that the Supreme Court concerned itself only with the question of whether the defendant, Virginia Van-Y, was a constructive trustee of the proceeds of the trust wherein she was the first beneficiary and Phoenix Title the trustee. Nothing was said to indicate that Phoenix Title was a constructive trustee. The

appellant is limited to a claim against Mrs. Van-Y and not from Transamerica Title. We find no error in the trial court's determination that Transamerica was not a constructive trustee.

WAS THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED?

The final point raised by the appellant is the granting of the motion for summary judgment. Rule 56(e) of the Rules of Civil Procedure states:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate,* shall be entered against him." (Emphasis ours.)

In the instant case Transamerica Title moved for summary judgment supported by affidavit and memorandum. Plaintiff responded by "Reply to Motion" which contained memorandum of authority.

The court in the judgment recited as follows:

> "It appearing and the Court finding that the plaintiff did not respond to the Motion for Summary Judgment other than by her Memorandum filed herein, as aforesaid, and
>
> "It further appearing and the Court finding that the pleadings, depositions, and admissions on file, together with the affidavit filed on behalf of Transamerica Title Insurance Company, show that there is no genuine issue as to any material fact as between the plaintiff and Transamerica Title Insurance Company, Trustee."

Appellant contends in its brief that "there was nothing to controvert, and therefore, no controverting affidavit was necessary."

Although our Supreme Court has stated that the 1963 amendment to Rule 56(e) did not change the meaning of the rule but merely clarified what had always been their purpose, Wakeham v. Omega Construction Company, 96 Ariz. 336, 395 P.2d 613 (1964), we feel that by adding the words "if appropriate" in the last line of Rule 56(e) makes it clear that where a party fails to controvert an affidavit in support of a motion for summary judgment, the court may grant the motion for summary judgment only when it finds from the record that the granting of the motion is appropriate.

In the instant case construing the record in a light most favorable to the party opposing the motion, Madsen v. Fisk, 5 Ariz. App. 65, 423 P.2d 141 (1967), we feel the court was correct in granting the motion for summary judgment.

Judgment affirmed.

DONOFRIO, J., and WILLIAM H. GOODING, Superior Court Judge, concur.

NOTE: Judge HENRY S. STEVENS having requested that he be relieved from consideration of this matter Judge WILLIAM H. GOODING was called to sit in his stead and participate in the determination of this decision.

APPENDIX F

410 P.2d 662
100 Ariz. 53

Edna (Van-Y.) MARKEL,
Appellant,
v.
PHOENIX TITLE & TRUST CO., Trustee, and Virginia R. Van-Y,
Appellees.
No. 7525

SUPREME COURT OF ARIZONA
IN DIVISION
Feb. 2, 1966

Alan Philip Bayham, Phoenix, for appellant.

Carl W. Divelbiss, Phoenix, for appellees.

BERNSTEIN, Vice Chief Justice.

Plaintiff, Edna Markel, appeals from the judgment of the Superior Court of Maricopa County, GRANTING DEFENDANT'S MOTION FOR JUDGMENT AT THE CLOSE OF PLAINTIFF'S CASE. Plaintiff was divorced from Earl E. Van-y in December of 1939 in Wichita, Kansas. Defendant, Virginia Van-y, was married to Earl E. Van-y from February 1941, to the time of his death, in Wichita, in April, 1959. Before her husband's death defendant sold a parcel of land situate in Arizona previously held in his name. It is this sale which gave rise to the present cause of action. Simply stated, plaintiff seeks to impose a constructive trust on one-half of the $25,000 realized from the sale of this realty in Maricopa County, Arizona.

On December 13, 1939, the District Court of Sedgwick County, Kansas, entered the following judgment in the divorce proceedings:

> "The Court further finds that a property settlement has been entered into in lieu of alimony, which is satisfactory to the parties, and the same is hereto attached and marked Exhibit A,

and made a part hereof just as fully and completely as if herein set out."

* * * * * *

"It is further CONSIDERED, ORDERED, ADJUDGED and DECREED that the property settlement between the plaintiff and defendant, in lieu of alimony, be and the same is hereby approved."

The following is Exhibit A, part of the property settlement approved by the Kansas court:

"NOW, THEREFORE, In consideration of the covenants and agreements hereinafter contained, said second party (Earl E. Van-y) agrees to give to first party (plaintiff) one-half interest in any funds that may be obtained through lease sale or disposal in any way of a certain twenty (20) acres, covering the following described property, to-wit:"

Defendant contends this Kansas settlement was in lieu of alimony in that it was not for a definite and fixed sum and it was void. However, Feldmann v. Feldmann, 166 Kan. 699, 204 P.2d 742 holds that property settlements, as distinguished from alimony, need not be for a fixed sum. The following quote from the Feldmann case supports plaintiff:

"* * * The trouble with appellant's position is that the decisions on which he relies are not in point and that he entirely overlooks another line of cases, applicable to the facts and circumstances here involved, *holding there is a distinct difference between what the court has authority to do under the statute with respect to alimony in a divorce case and what the parties may agree upon.* We are not disposed to labor those decisions. It will suffice to say they hold, see Hyde v. Hyde, 143 Kan. 660, 56 P.2d 437, Petty v. Petty, 147 Kan. 342, 76 P.2d 850, and cases therein cited, a husband and wife may enter into a marriage settlement whereby they agree upon a division of property as between themselves and payments to be made by the husband to the wife for the care and support of their children, including maintenance of the wife as well while such children are in her care and custody, and that such an agreement, where it has been freely and fairly made, may be made a part of the judgment in a divorce action and that the judgment thereby entered as to payments to be so made

to the wife is valid even though the sum total of such payments is neither itemized as to purpose nor definitely fixed as to amount. * * *" (Emphasis in original.)

Further, defendant is attempting to collaterally attack a sister state judgment without first showing there was a lack of jurisdiction over the parties or of the subject matter. In Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186, the Supreme Court said:

"However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." 375 U.S. at 111, 84 S.Ct. at 245.

Defendant further contends the judgment of the Kansas court attempted to transfer title to land situated in Arizona and this is in violation of the principle enunciated in Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 which prohibits one jurisdiction from directly affecting title to land in another jurisdiction. The Kansas court expressly left title in the name of Earl E. Van-y and gave plaintiff a "one-half interest in any *funds* * * * obtained through lease or sale" (emphasis added) of the property. We believe MacDonald v. Dexter, 234 Ill. 517, 85 N.E. 209, is quite similar to the case before us. There, a Missouri court *denied* a party an interest in the proceeds of land situated in Illinois. All parties in interest were before the Missouri court. Illinois held that an adjudication as to an interest to *proceeds* in land situated in Illinois was not an adjudication directly as to the title of the land itself. The court explained its holding as follows:

"* * * This contract obviously was not intended to give appellant any right to have a portion of the land in question conveyed to him or to give him any interest of any kind in the

land itself, but only an interest in the net profits that might arise from its sale, whatever right or claim appellant might have as to the profits would not require the court to deal directly with the land itself, and would not, therefore, affect the real estate; hence it affords no objections to the jurisdiction of the Missouri court, which had all the parties in interest before it, even though the land out of which the profits were to arise was without the jurisdiction of the court. * * *" 234 Ill. at 524, 85 N.E. at 212.

Defendant contends there is a lack of privity between her and her deceased husband so that she takes his land free of the constructive trust plaintiff asserts exists in her favor. We find the law is against defendant on this issue for,

> '"* * * A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase."' In re Hanson's Estate, 126 Cal.App.2d 71, 77, 271 P.2d 563, 567. Cited with approval in National Public Service Insurance Co. v. Welch, 81 Ariz. 156, 302 P.2d 926.

No useful purpose would be served in taking up in minute detail all of the various encumbrances and conveyances prior to the date defendant obtained her warranty deed to the land in issue. Suffice it to say that on February 12, 1957 Earl E. Van-Y transferred a warranty deed to his attorney O. W. Helsel; that on May 5, 1957, O. W. Helsel transferred a quit claim deed to Galen Childers (defendant's brother-in-law); that on May 17, 1957 Galen Childers transferred a warranty deed to defendant and on September 6, 1957, Earl E. Van-y gave defendant a disclaimer deed. Defendant admitted, at trial, she was at all times aware of plaintiff's property settlement of 1939. Further, the consideration in the final conveyance to her was $500 and the land shortly thereafter sold for $25,000.

When a judgment is decided against plaintiff at the close of his case, the appellate tribunal must consider the evidence and inferences to be drawn therefrom in a light most favorable to plaintiff. We believe the facts in this case brought out at trial

create a prima facie case of constructive fraud. See Joseph v. Tibsherany, 88 Ariz. 205, 354 P.2d 254.

A constructive trust expresses the idea that a defendant is under an equitable duty to give the complainant the benefit of property held. A wrongful holding begs relief whether the type of injustice is old or new regardless of whether actual fraud exists.

> "* * * where actual fraud does not exist in the acquisition of property, a constructive trust will arise whenever the circumstances make it inequitable that the property should be retained by the one who holds the legal title. * * The forms and varieties of these trusts are practically without limit and the principle is applied wherever it is necessary for the obtaining of complete justice." Linder v. Lewis, Roca, Scoville and Beauchamp, 85 Ariz. 118, 123, 124, 333 P.2d 286, 290.

See Bogert on Trusts, § 471, Second edition.

> "* * * A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. * * * A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief." Cardozo, C. J., in Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 389, 122 N.E. 378, 380, 381.

Finally, appellee contends that appellant's first assignment of error does not specify with particularity the error relied upon. However, Rule 5(c), 17 A.R.S. having been deleted by this court there is no merit in this argument. Nor do we believe that the defense of laches is here applicable. It was not necessary for appellant to enforce her right to an interest in one-half of the funds from the sale of the twenty acres until there was a bona-fide sale.

IN THAT DEFENDANT NEVER PRESENTED HER CASE THERE MUST BE A NEW TRIAL CONSISTENT WITH THIS DECISION. The judgment of the trial court is reversed.

STRUCKMEYER, C. J., and UDALL, J., concurring.